IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 145 of 1978

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAGANLAL NICHHABHAI

Versus

CHHAGANLAL BHANABHAI

Appearance:

MR SH SANJANWALA for Petitioners

MR SN SHELAT for Respondent No. 1

RULE SERVED for Respondent No. 3, 4, 5, 6

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 06/10/2000

ORAL JUDGEMENT

This appeal arises of the judgment and order dated 30th September, 1977, passed by the learned District Judge, Valsad, in Regular Civil Appeal No.

97/74, arising of the judgment and order dated 27th September, 1974, passed by the learned Civil Judge (SD) Valsad, in Regular Civil Suit No. 147/71.

The appellants before this court are the plaintiffs . The suit was instituted by the appellants herein against the present respondents for recovery of possession of the suit land referred to in Schedule-A to the plaint and for permanent injunction against the defendants nos. 1 and 2 restraining the said defendants from entering the suit land referred to in Schedule-B to the plaint. Schedule-A land is a rectingular piece of land, admeasuring 14' 6" North-South and 102' East-West. The Schedule-B land is 102' long and 14' 6" wide open land. The defendants nos. 3 and 6 are the brothers and the sons of one Jogibhai. The plaintiffs nos. 1 to 4 and defendants nos. 4 and 5 are the sons of the defendant no.3 and plaintiff no. 5 is the son of the defendant no.6. It was alleged that the entire land of Schedule-A and B to the plaint was purchased by the grand-father of the plaintiffs i.e. one Jogibhai Vasan in the year 1932, and all the plaintiffs and the defendants nos. 3 to 6 had inherited the said land from the said Jogibhai Vasan. The land was thus joint family property and the plaintiffs and the defendants nos. 3 to 6 were coparceners therein. The defendants nos. 1 and 2 are the distant relatives of the plaintiffs and the defendants nos. 3 to 6. The defendants nos. 3 and 6 had given 20 Ft. wide strip of land to one Haribhai Dhanjibhai. Said Haribhai Dhanjibhai had constructed 11 Ft. wide house on the said land leaving 9 Ft. wide strip of land open. Somewhere in the year 1949, said Haribhai Dhanjibhai had permitted the defendants nos. 1 and 2 to construct a house on the said 9 Ft. wide strip of land. After the death of said Haribhai Dhanjibhai, his sons had asked the defendant no.1 to remove that house and to hand over the possession of the land beneath. The defendant no.1, therefore, approached the defendants nos. 3 and 6 to part with 14 1/2 Ft. wide strip of the suit land on the Northern side and accordingly an agreement was executed on 25th October, 1970.. The defendants nos. 1 and 2 constructed a house on the said piece of land and raised dispute regarding possession and use of the remaining open land. It was alleged that the suit land was joint family property and could not have been disposed of by the defendants nos. 3 and 6. The said agreement dated 25th October, 1970, was without consideration and was null and void.

The suit was duly contested by the defendants nos. 1 and 2. The defendant no.1 filed his written

statement at Ex. 23. It was contended that the piece of land 156 Ft. North-South and 102 Ft. East-West belonged to their common ancestor one Raghav. Said Raghav had two sons Jivan and Bharat and the entire piece of land was the joint family property of said Jivan and Bharat, and a piece of land 78 Ft. North-South and 102 Ft. East-West came to the share of their descendent Vasan. The parties to the suit are the descendents of the common ancestor the said Vasan from whom the defendants nos. 3 and 6 each had inherited a piece of land and the suit land was inherited by the defendant no.1 as descendent of the said Vasan through the other branch. The defendants also challenged the genuineness of the sale-deed (Ex. 101), under which the entire piece of land including the suit land was alleged to have been purchased by Jogibhai Vasan the grand father of the plaintiffs. They denied the agreement dated 25th October, 1970 (Ex-100). The suit was decreed by the learned trial Judge. It was held that the suit land was the ancestral property of the plaintiffs and the defendants nos. 3 to 6. The defendants nos. 3 and 6 could not have disposed of the said land under agreement dated 25th October, 1970 (Ex-100), and accordingly directed the defendants nos. 1 and 2 to remove the construction on the suit land and to hand over the possession of the suit land. Feeling aggrieved, the defendants nos. 1 and 2 preferred Regular Civil Appeal No. 97/74. In the said appeal, the learned District Judge held that the defendants nos. 1 and 2 had constructed the house on the suit land of Schedule-A to the knowledge of the plaintiffs and the plaintiffs were, therefore, estopped from claiming demolition of the house and restitution of possession of the land. Feeling aggrieved, the plaintiffs have preferred the present appeal. The defendants nos. 1 and 2 have also filed Cross Objections in so far as relief in respect of the Schedule-B land was granted.

Mr. Sanjanwala has submitted that the moot question was whether the suit land was ancestral property or not, and if it were the ancestral property the plaintiffs and the defendants nos. 3 to 6 were coparceners therein and in absence of any necessity, whether the transfer/alienation by one of the coparceners can be said to be a valid transfer. Further, the learned Judge has wrongly decided the point of estoppel. If at all the defendants nos. 1 and 2 were claiming estoppel, it was imperative for them to raise such plea and to lead evidence in that respect. In absence of any pleading or any evidence with respect to estoppel, the learned District Judge could not have denied the decree on the basis of estoppel alone. He has therefor relied upon the

judgment of the Bombay High Court in the matter of GOVINDBHAI LALLUBHAI PATEL VS DAHYABHAI NATHABHAI PATEL & ORS (AIR 1937 BOMBAY 326). Mr. Shah has appeared for the respondents nos. 1 and 2. He has supported the judgment and relied upon the judgments of the Supreme Court in the matters of BINA MURLIDHAR HEMDEV & ORS VS KANHAIYALAL LOKRAM HEMDEV (AIR 1999 SC 2171) and KONDIBA DAGDU KADAM VS SAVITRIBAI SOPAN GULAR & ORS ({1999} 3, SCC 722). In the matter of Govindbhai Lallubhai Patel (supra), the Bombay High Court has held that - " For raising an estoppel, the declaration, act or omission must be made with the intention of causing or permitting another person to believe a thing to be true and act upon such belief. Estoppels must be specifically pleaded and strictly proved. They operate between the person making the declaration and the person believing and acting upon it and the representatives of those persons. Therefore, before an estoppel can be relied upon, it will in the first place have had to be alleged and proved that the plaintiff intentionally caused the defendant to believe that the subject matter of the suit was less than Rs.10,000/- and not more." In the matter of Bina Murlidhar Hemdev (supra), the Court was considering the question of grant of temporary injunction pending the suit. In my view, the observations made therein in respect of grant of temporary injunction can not lend support to the case of the defendants nos. 1 and 2. In the matter of Kondiba Dagadu Kadam (supra), the Hon'ble Supreme Court has discussed the extent to which the High Court can exercise its jurisdiction in Second Appeal preferred under section 100 CPC. The court held that - " If satisfied the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. " It further held that - " The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The Second Appeal can not be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous can not be disturbed by the High Court in exercise of the powers under this section The substantial question of law has to be distinguished from a substantial question of fact. "

I am of the view that Mr. Sanjanwala is right in contending that the lower appellate court has allowed the appeal on a mere ground of estoppel and has not rendered decision on the matter at issue i.e. whether the suit land was part of undivided joint family property of the plaintiffs and the defendants nos. 3 to 6. Unless the

said issue were decided, no decision could have been rendered on the other issues. Further, the lower appellate court has gravely erred in dismissing the suit on the ground of estoppel alone. The defendants nos. 1 and 2 had not raised the plea of estoppel in their written statement, nor there is any evidence of the plaintiffs' making a declaration or an act of commission or omission with the intention of permitting the defendants nos. 1 and 2 to construct house on part of the suit land. In absence of such pleading and evidence, the lower appellate court could not have proceeded to render decision on the point.

In above view of the matter, the Second Appeal must succeed. The appeal is allowed with costs. The judgment and order dated 30th September, 1977, of the learned District Judge, Valsad, in Regular Civil Appeal No. 97/74 is quashed and set aside. The Regular Civil Appeal No. 97/74 is remanded to the learned District Judge, Valsad, for decision on points for determination arising of the matter. The Cross Objections preferred by the defendants nos. 1 and 2 stand disposed of. The defendants nos. 1 and 2 will bear their own costs and the costs of the plaintiffs-appellants and the defendants-respondents nos. 3 to 6..

(MS R.M.DOSHIT J)

JOSHI